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No. 08-198

IN THE
# Supreme Court of the United States

HUNTLEIGH USA CORPORATION,

*Petitioner,*

*v.*

THE UNITED STATES,

*Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

## REPLY BRIEF

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## STATEMENT PURSUANT TO RULE 29.6

Petitioner Huntleigh USA Corporation is wholly owned subsidiary of ICTS International N.V., a publicly-held limited liability company whose shares are traded on the NASDAQ.

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Through the ATSA legislation,[1] the Government nationalized Huntleigh's passenger and baggage screening business. In doing so, it stepped into Huntleigh's shoes, hired its own screeners (many of them former Huntleigh employees), and started charging airlines a fee for screening services—just as Huntleigh had before the enactment of ATSA. The Government did all of this under the auspices of a statute that was designed to replace private screeners with Government employees and is *directly targeted* at private screening contracts (*i.e.*, it expressly makes it unlawful for a private company like Huntleigh to perform screening services at U.S. airports pursuant to contracts). There is no *bona fide* question that, as a direct result of the Government's nationalization of airport screening, Huntleigh lost its valuable contracts, the going-concern value of its business, and the goodwill it had built up over many years. Yet the Government in its Brief in Opposition ("BIO") insists Huntleigh is owed nothing—that the extinguishment of its property interests is really merely the indirect byproduct of "regulation" directed at airlines, and thus not a "taking" at all. The Government's position, like the Federal Circuit's below, is completely divorced from reality, rides roughshod over the text and purpose of ATSA, perverts this Court's precedent, and eviscerates the Fifth Amendment's protection of private property rights.

The Federal Circuit not only ignored ATSA's plain terms, but also misconstrued *Omnia Commercial Co. v. United States*, 261 U.S. 502 (1923), transmogrifying it

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[1] All acronyms and abbreviations used herein are defined in Huntleigh's Petition for Certiorari ("Petition").

into a blanket authorization for the Government to nationalize businesses and extinguish contract rights without paying just compensation, so long as it refrains from crossing out right-holders' names on extant contracts and replacing them with its own. The Federal Circuit's unprecedented and erroneous expansion of the limitations imposed on private property owners' Fifth Amendment claims by the *Omnia* "frustration" rule in the case at bar cries out for this Court's review. After all, there is no doubt that if the Government had written "TSA" over Huntleigh's name on the screening contracts with the airlines, compensation would be due. It cannot be the law that the private property rights protected by the Fifth Amendment can be so easily circumvented by a clever transaction form or depend on such technical formalities. Just five years ago, the Federal Circuit *itself* rejected such a strained construction of the Just Compensation Clause, explaining that "the abrogation by legislation of clear, unqualified contract rights requires a remedy, even in a highly regulated industry," and that, accordingly, "legislation aimed at . . . contract rights themselves in order to nullify them" effects a compensable taking. *Cienega Gardens v. United States*, 331 F.3d 1319, 1334, 1335 (Fed. Cir. 2003).

The questions presented in the Petition are extremely important ones that bear on the scope of the Government's responsibility when it implements legislation with the avowed purpose and undeniable effect of nationalizing a private industry. The Federal Circuit's inconsistent rulings in the takings area offer no clear guidance, and, contrary to the Government's assertions in its BIO, opportunities for other courts of

appeal and state courts to clarify the law on the questions presented are rare at best. The decision below will no doubt generate special mischief and concern as the current financial crisis ripens, and along with it the Government's expanding acquisitions of private business interests. With the United States acquiring huge stakes in private financial institutions and exploring new ways to secure the banking industry, the need to identify the line between a compensable taking and a mere frustration of business expectations will no doubt become all the more pressing. The Petition should be granted.

## 1. The Federal Circuit's Extension of *Omnia*'s "Frustration" Rule to This Case is Erroneous.

The Federal Circuit rejected Huntleigh's takings claim because, in its view, Huntleigh's losses of its contracts, going-concern value, and goodwill were merely "indirect" effects of ATSA. (Pet. App. 20a.) The court reached that conclusion even though ATSA expressly targets "air carrier . . . contract[s] for provision of passenger screening services at airports in the United States," ATSA § 101(g)(2), 115 Stat. at 603 (Pet. App. 106a), and makes it unlawful for a private company to perform under existing screening contracts. The Government's efforts to defend the Federal Circuit's holding only highlight the jurisprudential havoc that will likely result from that holding.

Tracking the Federal Circuit's reasoning below, the Government essentially argues that the *Omnia* rule bars takings claims in every case where the Government has avoided executing a formal novation of the private

contract alleged to have been taken. (*See* BIO at 6.) This is a distortion of the *Omnia* ruling, which, properly read, simply precludes remote claimants from suing the Government for a taking. In sharp contrast to this case, *Omnia* involved a claim for classic consequential damages flowing from the *taking of a third party's property*. In *Omnia*, the United States took steel belonging to a steel producer. *See Omnia*, 261 U.S. at 502. That taking made it impossible for the steel producer, in turn, to supply the appropriated steel to a manufacturer that had agreed to purchase it. *See id.* It bears emphasis that the plaintiff in *Omnia* was *not* the steel producer, the direct target of the Government's taking (like Petitioner here), but was an the entity down the chain that was forced, as a consequence of the Government's action, to look elsewhere for replacement goods. On those facts, this Court held that the manufacturer could not assert a viable takings claim because its only losses were "consequential" to the primary taking. *Id.* at 510. The manufacturer's contract with the steel producer was not "taken," but merely was frustrated by the taking of *the steel producer's property*. *Id.*

To the extent this case can be analogized to *Omnia* at all, Huntleigh is equivalent to the steel producer—the primary (indeed, the only) the target of the taking. Huntleigh is the entity that suffered the only direct loss at the hands of the Government. And, as the Court in *Omnia* made clear, the primary target of the taking *is* entitled to compensation: "If the government had failed to pay for what it got, what would have been the right of the steel company? . . . *[T]he just compensation guaranteed by the Constitution.*" *Id.* at 511 (emphasis

added). In relying on this passage for its own argument, the Government conveniently omits reference to the last—and key—sentence. (*See* BIO at 6.)

To try to escape this conclusion here, the Federal Circuit and the Government have manufactured an obstacle to Huntleigh's claim: They insist that ATSA "regulate[s]" the airlines and not Huntleigh (Pet. App. 20a; BIO at 7-8), and they argue that this is fatal to Huntleigh's claim. The argument is wrong on two levels. First, it contravenes the explicit terms of ATSA, which clearly acknowledges the Government's intention to replace private "passenger screening services" with Government services, ATSA § 101(g), 15 Stat. at 603 (Pet. App. 106a), and, second, it erroneously assumes that a party must be the *only* target of a regulation in order to bring a valid takings claim. To be sure, the airlines themselves were regulated by ATSA. But private screening companies *also* were directly regulated by ATSA, and they are the primary target of the sole *takings* effected thereby. That is precisely why this case differs so dramatically from *Omnia* and *Air Pegasus of D.C., Inc. v. United States*, 424 F.3d 1206 (Fed. Cir. 2005), another inapposite case relied up on by the Federal Circuit. (*See* Pet. App. 16a.) In both of those cases, another party had suffered a taking upon which the plaintiff sought to piggyback. In *Omnia*, the manufacturer sought to piggyback upon the taking of the steel producer's property. In *Air Pegasus*, the lessee of the heliport sought to piggyback upon the purported taking of the helicopter operators' property. *See Air Pegasus*, 424 F.3d at 1215. Here, Huntleigh seeks compensation for property taken directly from *it*—its security contracts, going-concern value, and goodwill.

It is not seeking to piggyback on anyone. The Government nationalized *Huntleigh's* business. In attempting to wield *Omnia* as a shield against Huntleigh's claim, the Federal Circuit unjustifiably and vastly expanded the scope of this Court's holding in that 85 year old case.

**2. The Federal Circuit's Decision Below Stands in Direct Contradiction to Its Decision in *Cienega Gardens*.**

The Government fails in its effort to reconcile the Federal Circuit's decisions in this case and in *Cienega Gardens*, 331 F.3d 1319. (*See* BIO at 10-12.) The court in *Cienega Gardens* held that a takings claim was stated where Congress eliminated a contractual right to prepay a mortgage after 20 years—a right that was contained in a *private contract* between the mortgage-holders and their banks, not, as the Federal Circuit erroneously suggested, in any "contract with the federal government" (Pet. App. 23a). *See Cienega Gardens*, 331 F.3d at 1334-36. In reaching that conclusion, the Federal Circuit drew a distinction between "legislation targeted at some public benefit, which incidentally affects contract rights," and the situation presented here, where a valid takings claim would exist: "legislation aimed at the contract rights themselves in order to nullify them." *Id.* at 1335.

On its face, ATSA plainly falls into the latter category and, therefore, effected a compensable taking under the well-established analyses of *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), and *Penn Cent. Transp. Co. v. New York City*, 438 U.S. 104

(1978). In both this case and *Cienega Gardens*, the claimants' contractual rights (in *Cienega Gardens*, the right to pre-payment; here, *all* of Huntleigh's rights under its private contracts with the airlines) were swept away by legislation "aimed at [those] contract rights." Here, as in *Cienega Gardens*, a cognizable takings claim has been established.[2]

Indeed, that is exactly the conclusion the Court of Federal Claims first reached in this case. Before inexplicably reversing course, the trial court here correctly held that this case was controlled by *Cienega Gardens* and went so far as to conclude that: "The present case is even more egregious. More than rewriting the contracts between Huntleigh and the nation's airlines, the government has taken over Huntleigh's position as the contractor, and has created

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[2] Although the point has no bearing on the analysis, and was not addressed by the Federal Circuit, the Government insinuates that it did not actually take anything of value because many of Huntleigh's contracts "could be terminated without cause upon 30, 60, or 90 days' notice." (BIO at 2.) It is well-established, however, that intangible property rights are defined by the law of the state in which the plaintiff is domiciled. *See, e.g., Phillips v. Wash. Legal Found.*, 524 U.S. 156, 164 (1998) (applying Texas law to determine whether interest on funds located in Texas banks was compensable "property"); *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 999, 1001-04 (1984) (applying Missouri law where company alleging taking of intangible property was headquartered in Missouri). Missouri—which is Huntleigh's domicile—treats terminable contracts (even those terminable *at will*) as "property." *See, e.g., Downey v. United Weatherproofing*, 253 S.W.2d 976, 980 (Mo. 1953); *Clinch v. Heartland Health*, 187 S.W.3d 10, 15 (Mo. Ct. App. 2006).

for itself a sweeping monopoly." (Pet. App. 73a-74a.) On that unassailable reasoning, the Federal Circuit should have sustained Huntleigh's Fifth Amendment claim.

### 3. The Federal Circuit's Unprecedented—And Erroneous—Interpretation of this Court's Decision in *Kimball Laundry* Independently Warrants Granting the Petition.

The Federal Circuit below compounded its distortion of *Omnia* by applying a flawed "frustration" analysis not just to Huntleigh's claim for the taking of its contracts, but also to Huntleigh's claims for the taking of the going-concern value and goodwill of its business. (Pet. App. 24a n.3.) Then, as an alternative basis for barring recovery of just compensation for going-concern value and goodwill, the Federal Circuit held that a plaintiff cannot bring a takings claim for "going concern value" unless the alleged taking was "temporary" and not "permanent." (*Id.*) Contrary to the Government's assertion, this latter holding cannot be properly characterized as "dictum" (BIO at 9) because the court offered it as an independently sufficient basis for its holding. *See, e.g.*, *MacDonald, Sommer, & Frates v. Yolo County*, 477 U.S. 340, 345 n.4 (1986) (explaining that alternative holdings are not "dicta").

The holding is plainly untenable in light of this Court's established precedent. (*See* Petition at 19-21.) In fact, the Government does not contend otherwise. (*See* BIO at 9-10.)[3] Instead, the Government suggests—

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[3] The Government, quoting the Petition, suggests that Huntleigh is seeking to argue a point not reached by the (Cont'd)

without actually arguing—that the reasoning in *Kimball Laundry Co. v. United States*, 338 U.S. 1 (1949), does not necessarily translate from the physical takings context to the regulatory one. (*See* BIO at 10 n.4.) But while regulatory takings analysis differs in some respects from the analysis applicable to physical takings (for example, it often entails a balancing of public and private interests, *see Penn Cent. Transp. Co.*, 438 U.S. at 123-128), neither the Government nor the Federal Circuit has offered any reason why going-concern value and goodwill should be recognized as compensable property interests in the physical takings but not the regulatory takings context. The fallacy of the suggested distinction is illustrated by a slight variation on this case: If Huntleigh here had pursued a claim against the Government for the taking of physical assets—an office building, security equipment and/or employee uniforms, for example—without compensation, it would be entitled to claim compensation for those physical assets as well as for the other property interests taken (contracts, going-concern value, and goodwill).[4] In fact, Huntleigh

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(Cont'd)

Federal Circuit's decision: the valuation of the property taken. (*See* BIO at 9.) That is incorrect. What Huntleigh argued in its Petition was that, with its alternative holdings, the Federal Circuit erected two independent barriers to recovery of just compensation in the circumstances presented: (1) a "frustration" test purportedly based on *Omnia*; and, additionally, (2) a requirement that the intangible property rights of going-concern value and goodwill have been temporarily, rather than permanently, taken. (*See* Petition at 19-21.)

[4] For analogous examples, see *Monongahela Navigation Co. v. U.S.*, 148 U.S. 312 (1893) and *In re Fifth Avenue Coach Lines*, 46 Misc.2d 14, 259 N.Y.S.2d 313 (Sup. Ct. N.Y. Co. 1964).

initially included within its takings claim certain physical assets, but declined to pursue that portion of the claim in light of the physical assets' *de minimus* value. There is no conceivable reason that Petitioner should be deprived of its substantive rights concerning its intangible private property rights merely because the value of the physical property taken by the Government had negligible value.

**4. The Intra-Circuit Conflict Warrants This Court's Review.**

Without question, the Court of Federal Claims and the Federal Circuit reviewing its decisions have exclusive jurisdiction over claims for just compensation under the Takings Clause of the Fifth Amendment against the Federal Government. *See* 28 U.S.C. § 1491(a)(1); 28 U.S.C. § 1295(a)(3). The Government's argument that claims for *injunctive* relief against the United States and takings claims against states may be adjudicated outside the Court of Federal Claims and the Federal Circuit overstates the breadth of the exceptions to the general rule and thus furnishes no valid reason to discount the gravity of split of authority within the Federal Circuit itself.

First, "[e]quitable relief [including injunctive relief] is not available to enjoin an alleged taking of private property for a public use, duly authorized by law, when a suit for compensation can be brought against the sovereign subsequent to the taking." *Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1016 (1984). In other words, plaintiffs who have available to them claims under the Tucker Act simply cannot seek injunctive relief; they must instead proceed to the Court of Federal Claims

*after* the taking has occurred. Only in those rare cases where Tucker Act relief is not even theoretically available can injunctive relief be sought in the first instance under the Fifth Amendment's Just Compensation Clause. *See Eastern Enters. v. Apfel*, 524 U.S. 498, 520-21 (1998) (outlining narrow exception). As this Court has recognized, Congress has ensured that circumstances where the Federal Circuit does not have jurisdiction to review claims against the federal government are necessarily rare, because "[a] motivating concern of Congress in creating the Federal Circuit was the special need for *nationwide uniformity in certain areas of the law*. . . . Nontort claims against the Federal Government present one of the principal areas in which Congress sought such uniformity." *United States v. Hohri*, 482 U.S. 64, 71-72 (1987) (quotation omitted) (emphasis added).

Second, while it is conceivable that states might seek to take over entire industries within their borders or even extinguish private contract rights for the benefit of the public generally, the likelihood of such action at the state level is fairly remote—particularly in this modern era of federalization and preemption. In an apt illustration of the point, all of the cases the Government cites as examples of takings claims asserted against states and their agencies are cases involving land use, which traditionally is a matter of local concern, regulated at the state or local level. *See, e.g., Murphy v. New Milford Zoning Comm'n*, 402 F.3d 342, 348 (2d Cir. 2005). (*See* BIO at 13.)[5]

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[5] The Government's observation that federal courts other than the Court of Federal Claims and the Federal Circuit can (Cont'd)

## CONCLUSION

For the foregoing reasons, and those articulated in Huntleigh's Petition, Huntleigh respectfully requests that its petition for writ of certiorari be granted.

Respectfully submitted,

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(Cont'd)
adjudicate eminent domain actions initiated by the United States pursuant to 40 U.S.C. § 1331 and Fed. R. Civ. P. 71.1 (*see* BIO at 13 n.6) likewise hardly demonstrates that those courts regularly are presented with the issues arising in *this* case, which involves the taking of contract and other intangible rights, not the taking of real property.